083 B

Nos. 06-5618 & 06-5754

IN THE

Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES,

Respondent.

VICTOR A. RITA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eighth and Fourth Circuits

---

BRIEF OF LAW PROFESSORS WHO STUDY SENTENCING REFORM AS *AMICI CURIAE* IN SUPPORT OF NONE OF THE PARTIES

EDWARD LEE
55 West 12th Avenue
Columbus, Ohio 43210
(614) 292-3201
Counsel of Record
for Amici Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

I. PRINCIPLES FOR FEDERAL SENTENCING 3

A. The Virtues and Vices of Judicial Sentencing Discretion 4

1. Virtues of individualized and reasoned justice 4

2. Vices of unexplained (and perhaps unjustifiable) decisions by judges 6

B. The Virtues and Vices of Sentencing Guidelines 10

1. Virtues of system-wide rules as starting points 10

2. Vices of unexplained (and perhaps unjustifiable) decisions by the Sentencing Commission 12

II. A STATEMENT OF MODERN FEDERAL SENTENCING PRINCIPLES 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Koon v. United States, 518 U.S. 81 (1996) .....*passim*

Mistretta v. United States, 488 U.S. 361 (1989) .....*passim*

United States v. Booker, 543 U.S. 220 (2005) .....*passim*

United States v. Buchanan, 449 F.3d 731 (6th Cir. 2006) 3

United States v. VanLeer, 270 F. Supp. 2d 1318 (D. Utah 2003).....8

Statutory Materials

18 U.S.C. § 3553(a).....*passim*

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003.....8, 9

S. REP. NO. 98-225 .....8, 11

Other Authorities

Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005) 16

American Law Institute, *Model Penal Code: Sentencing*, Council Draft No. 1, § 102(2) (Sept. 27, 2006).....7

Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367 (1989) 10

Brief of New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner, *Rita v. United States*, No. 06-5754 (2006) 13

Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93 (1999) 11

Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics, in A More Perfect System: Twenty-Five Years of Guideline Sentencing Reform*, 58 STAN. L. REV. 277 (2005) 12

Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUSTON L. REV. 341 (2006) . 15

Kate Stith & Jose A. Cabranes, *To Fear Judging No More: Recommendations for the Federal Sentencing Guidelines*, 11 FED. SENT'G REP. 187 (1999) 16

MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER ..... *passim*

Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 358 (2004) 9

Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721 (2002). 16

Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249 (2005) 12

Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267 (1977) ..... *passim*

Senator Edward M. Kennedy, *Foreword* to PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977) 7

The Constitution Project, *Principles for the Design and Reform of Sentencing Systems: A Background Report* (2006) 8

U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004) 16

William W. Mercer, *Assessing Compliance with the U.S. Sentencing Guidelines: The Significance of Improved Data Collection and Reporting*, 16 FED. SENT'G REP. 43 (2003) 9

INTEREST OF *AMICI CURIAE*[*]

Amicus curiae are a group of law professors who teach, study and write about sentencing reform and have closely followed the operation of the Federal Sentencing Guidelines in lower courts both before and after this Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005). Among the group are law professors who are co-authors of the leading casebook in the field of sentencing, *Sentencing Law & Policy* (Aspen 2004), and who are editors of and contributors to the leading law journal in the field of sentencing, the *Federal Sentencing Reporter*. Collectively, the professors in this group have written more than 100 articles and commentaries about federal sentencing reform.

The group is comprised of: Professor Douglas A. Berman, the William B. Saxbe Designated Professor of Law at the Moritz College of Law at The Ohio State University; Professor Margareth Etienne, Assistant Professor of Law, University of Illinois College of Law; Professor Marc Miller, Ralph W. Bilby Professor of Law, Rogers College of Law at the University of Arizona; Professor Michael M. O'Hear, Associate Professor of Law at Marquette University Law School; Professor Mark Osler, Professor of Law, Baylor Law School; Dean David N. Yellen, Dean and Professor of Law at Loyola University Chicago School of Law.

Amici offer this brief to highlight sentencing reform principles they believe can help inform the Court's resolution of these cases.

---

[*] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

A set of long-standing federal sentencing principles should inform the Court's resolution of these cases. These are principles that find expression in the writings of Judge Marvin Frankel and Professor Norval Morris, two leading advocates of reform proposals that resulted in the Sentencing Reform Act of 1984. These are principles that animate provisions of the Sentencing Reform Act of 1984 and the PROTECT Act of 2003, especially the detailed sentencing instructions Congress has set forth in 18 U.S.C. § 3553. These are principles that have been emphasized by this Court in rulings from *Mistretta v. United States*, 488 U.S. 361 (1989), to *Koon v. United States*, 518 U.S. 81 (1996), to *United States v. Booker*, 543 U.S. 220 (2005).

These principles recognize the critical importance of judicial sentencing discretion and suggest the touchstone of federal sentencing should be district courts exercising reasoned judgment in response to case-specific factors and broader norms established by the Constitution and Congress.

ARGUMENT

> "It is our duty to see that the force of the state, when it is brought to bear through the sentences of our courts, is exerted with the maximum we can muster of rational thought, humanity, and compassion."
>
> — MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 124 (1972)

> "The judge is an inevitably appropriate sentencing figure in the drama of crime and punishment ... [and] it should increasingly be required that the judge give reasons for his choice of sentence and that his sentences, and thus his reasons, be subject to appellate review. Principled sentencing lies at the heart of an effective criminal justice system. It is obvious that sentencing involves a heavy

> responsibility and raises issues of difficulty; it thus requires reasons given, critical public consideration of those reasons, critical appellate review of those reasons."
>
> **— Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 275-76 (1977)**

I. PRINCIPLES FOR FEDERAL SENTENCING

In *Mistretta v. United States*, this Court emphasized the "uniquely judicial subject of sentencing," and explained why all sentencing decision-making "lies so close to the heart of the judicial function." 488 U.S. at 408. In *Koon v. United States*, this Court stressed that it "has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." 518 U.S. at 113. A related point drew consensus in *United States v. Booker*: "everyone agrees that the constitutional issues presented by [judicial fact-finding at sentencing] would have been avoided entirely" if the Guidelines were not binding because "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." 543 U.S. at 233.

Mistretta, *Koon*, and *Booker* all spotlight that a constitutionally sound and practically sensible sentencing system is one in which the Federal Sentencing Guidelines enhance, rather than encumber, the judicial exercise of reasoned judgment at sentencing. And the text Congress set forth in 18 U.S.C. § 3553(a) details how the Guidelines should help inform, and not restrict, the assessment of "every convicted person as an individual and every case as a unique study in ... human failings." *Koon*, 518 U.S. at 113; *cf. United States v. Buchanan*, 449 F.3d 731, 741 (6th Cir. 2006)

(Sutton, J., concurring) (stressing that, after *Booker*, district courts "retain the ultimate authority within reason to apply the § 3553(a) factors to each criminal defendant.... The end is not process in itself but the substantive goal that trial judges exercise independent and deliberative judgment about each sentence—making these sentences more than an algebraic equation and less than a Rorschach test.").

This Court needs to ensure that circuit courts incorporate these long-standing federal sentencing principles into the application of reasonableness review after *Booker*. Lower courts should view and apply the Federal Sentencing Guidelines as helpful (but sometimes flawed) advice that can aid sentencing judges when exercising reasoned judgment in light of case-specific realities and broader norms. Unfortunately, despite the instructive statutory text of § 3553(a) and this Court's work in *Koon* and *Booker*, many circuit courts apparently believe the Guidelines should confine, rather than contribute to, the exercise of reasoned judgment at sentencing. The Court should use these cases to correct any approach to reasonableness review that, by thwarting the thoughtful exercise of reasoned judgment by district courts at sentencing, is constitutionally suspect and generally unwise.

A. The Virtues and Vices of Judicial Sentencing Discretion

1. Virtues of individualized and reasoned justice

A decade ago, this Court's unanimous *Koon* decision emphasized the importance of ensuring that district judges retain sufficient discretion under the Sentencing Reform Act of 1984 ("SRA") to impose individualized and reasoned sentences. *Koon* was an interpretation of the provisions of the SRA, and this Court highlighted that Congress in the SRA recognized "the wisdom, even the necessity, of sentencing procedures that take into account individual

circumstances." *Koon*, 518 U.S. at 92 (citing 28 U.S.C. § 991(b)(1)(B), which mandates that the Sentencing Commission create guidelines that "maintain[] sufficient flexibility to permit individualized sentences"). The *Koon* ruling stressed what the Sentencing Commission has always recognized: "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." *Id.* at 93 (quoting U.S. SENTENCING GUIDELINE MANUAL, Ch. 1, pt. A (1995)). Consequently, *Koon* set out an approach to departures and appellate review specifically designed to effectuate Congress's "intent that district courts retain much of their traditional sentencing discretion." *Id.* at 97.

In *Booker*, the importance of judicial sentencing discretion took on a constitutional dimension. The remedy in *Booker* preserved a place for judicial fact-finding within a guideline scheme by declaring the Guidelines "effectively advisory" (which necessarily must afford district judges even more sentencing discretion than they possessed under the SRA). The *Booker* Court's endorsement of judicial fact-finding in an advisory guideline system, while finding constitutional problems with such fact-finding in a binding system, is justified by the traditional understanding of sentencing as a distinctive enterprise involving the exercise of reasoned judgment. The *Booker* decision recognizes and safeguards an important constitutional distinction between (1) finding facts that increase a sentencing range set by a legislature or sentencing commission (a task for juries), and (2) exercising judgment based on the consideration of relevant sentencing factors (a task for judges). *See generally* Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387, 406-14 (2006) (elaborating on these points).

In short, the *Booker* merits opinion stands for the constitutional principle that sentencing judges can consider a range of facts at sentencing when judicial fact-finding done in service to reasoned judgment. And the *Booker* remedial

opinion explains that, with the Guidelines "effectively advisory," federal judges are required "to take account of the Guidelines together with other sentencing goals" Congress set forth in 18 U.S.C. § 3553(a). *Booker*, 543 U.S. at 259. *Booker* thus now requires judges to exercise reasoned sentencing judgment by filtering the Guidelines' advice through the dynamic, multi-faceted, purpose-oriented provisions of § 3553(a).

After *Booker*, federal judges may no longer simply find Guideline-specified facts, plug these facts into a calculation, and then just follow the Guidelines' predetermined sentencing outcomes. As stressed in *Booker*, § 3553(a) instructs a judge to consider "the need to avoid unwarranted sentencing disparities" and the need for sentences to "reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care." *Booker*, 543 U.S. at 259-60 (quoting 18 U.S.C. § 3553(a)). Moreover, the central directive of § 3553(a) commands federal judges to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment while considering "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a). Consequently, federal judges must now integrate and assimilate the facts emphasized by the Guidelines with the broader judgment-oriented considerations Congress set out in § 3553(a). In this way, *Booker* ensures that federal sentencing decision-making remains, in the words of the *Mistretta* decision, "close to the heart of the judicial function." 488 U.S. at 408.

2. Vices of unexplained (and perhaps unjustifiable) decisions by judges

As long recognized by Congress and this Court, district judges must possess a certain measure of case-specific

discretion to render individualized and reasoned sentencing justice. But unregulated and unreviewed discretion can permit (and shield from view) reason*less* sentencing decisions. Indeterminate federal sentencing practices suffered not simply from too much judicial discretion, but rather from a paucity of express principles, reasoning and accountability in the sentencing process. *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 3-49 (1972) (lamenting "Law without Order or Limit" in Chapter 1 and "Walls of Silence" in Chapter 4); Senator Edward M. Kennedy, *Foreword* to PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977) (assailing disparity in the federal system before the SRA, but stressing that this "disparity cannot be traced to 'weak' judges": the "legislature ... must bear the blame" because Congress had not "built any standards or safeguards into the sentencing process").

Judge Frankel and Professor Morris advocated bringing reasoned law to sentencing through the development of principled rules and the review of the discretion exercised by sentencing judges. They stressed that judges should have to give reasons for their sentences and these reasons should be subject to scrutiny on appeal. By requiring reasoned and reviewable sentencing decisions, lawmakers could help ensure that each sentence would be imposed, in Judge Frankel's words, with "the maximum we can muster of rational thought, humanity, and compassion." FRANKEL, *supra*, at 124. Successful reforms not only bring more formal rules to sentencing, but also make decisions more reasoned, transparent, and open to appropriate scrutiny. *See generally* American Law Institute, *Model Penal Code: Sentencing*, Council Draft No. 1, § 102(2) (Sept. 27, 2006) (urging rules that preserve judicial discretion to individualize sentences "within a framework of law" and increase the transparency of sentencing decisions); The Constitution Project, *Principles for the Design and Reform of Sentencing*

Systems: A Background Report 16-18 (2006) (praising sentencing systems that, while retaining flexibility, guide decisions with legal principles and enhance transparency).

Congress in the SRA championed principled and transparent sentencing rules and the importance of requiring and reviewing reasons for the sentences that judges decide to impose. The SRA emphasizes four central sentencing purposes in 18 U.S.C. § 3553(a)(2) and throughout the rest of the Act. Notably, the primary statement of sentencing purposes appears in the SRA's instructions *to judges* concerning the "factors to be considered in imposing a sentence," *id.* § 3553(a), and the same statutory provision directs that a district court, "at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence." *Id.* § 3553(c). The Senate Report discussing these provisions stresses that Congress intended to "require that *the judge consider* what impact, if any, each particular purpose should have on the sentence *in each case*." S. REP. NO. 98-225, at 77 (1983) (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260. Of course, the original SRA also provided broad grounds for appellate sentencing review by both prosecutors and defendants, and Congress only a few years ago amended these appellate review provisions to make them more effective. *See* 18 U.S.C. § 3742; *see also* discussion of PROTECT Act, *infra*.

As evidenced by Congress's passage of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), even a complex sentencing structure can be refined to ensure the exercise of discretion is reasoned, transparent, and open to appropriate scrutiny. The PROTECT Act did not reject the long-standing principle that district judges must have sufficient sentencing discretion to impose individualized sentences. *See United States v. VanLeer*, 270 F. Supp. 2d 1318, 1319-26 (D. Utah 2003) (Cassell, J.) (stressing that PROTECT Act did not impact district courts' sentencing

discretion in most cases). Rather, the enacted provisions of the PROTECT Act reveal that Congress's chief concern was federal sentencing discretion hidden from appropriate and effective review. *See id.* at 1320-25 (detailing procedural focus of the PROTECT Act); *see also* William W. Mercer, *Assessing Compliance with the U.S. Sentencing Guidelines: The Significance of Improved Data Collection and Reporting*, 16 FED. SENT'G REP. 43, 43 (2003) (stressing that PROTECT Act was "intended to improve the collection and sharing of sentencing data among Congress, the courts, the Sentencing Commission, and the Justice Department"); Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 358, 366-69, 373 (2004) (explaining that "transparency and the rule of law, not national uniformity, [are] overarching purpose of the Guidelines system" and that the PROTECT Act's "most notable features of ... can be explained by reference to this objective" of enhancing transparency).[1]

Booker's revision to the operation of the Federal Sentencing Guidelines furthers the goal subjecting sentencing discretion to principled regulation and reasoned review. Rather than either sentencing-by-the-numbers or sentencing-by-the-seat-of-the-pants, *Booker* calls upon district courts,

---

[1] Numerous provisions of the PROTECT Act reveal that this legislation was principally about making the exercise of discretion within the federal sentencing system more transparent and subject to effective review. *See* PROTECT Act, Pub. L. No. 108-21, § 401(c), 117 Stat. 650, 670 (requiring district judges to state departure reasons "with specificity in the written order of judgment and commitment"); *id.* § 401(m) (ordering the U.S. Sentencing Commission to produce a report on departures); *id.* § 401(*l*) (ordering the U.S. Attorney General to create new procedures for appealing departures); *id.* § 401(d) (providing for circuit courts to review departures more rigorously and with clearer standards); *id.* § 401(m)(2)(B) (creating a formalized and transparent framework for "early disposition" departures).

guided by the intricate directives set out by Congress in § 3553(a), to exercise independent reasoned judgment when imposing a sentence. Circuit courts, in turn, must ensure sentences are both reasoned and reasonable by evaluating, in light of the directives of § 3553(a), district courts' explanations offered in support of their sentencing decisions. This Court should clarify that *Booker* calls for the Courts of Appeals to police the exercise of reasoned judgment at sentencing by declaring suspect any and all sentencing decisions that fail to address thoughtfully the congressional directives of § 3553(a).

B. The Virtues and Vices of Sentencing Guidelines

1. Virtues of system-wide rules as starting points

Judge Frankel and Professor Morris urged the creation of sentencing guidelines because they recognized that, by requiring the formulation of explicit sentencing rules, a guideline system would facilitate the development of reasoned and principled sentencing law and procedures.[1] Reformers called for legislatures to set basic punishment goals and broad policy parameters—as it should within a democratic society—and then empower a specialized commission to work with judges to create more detailed system-wide sentencing rules. To borrow again the words of Norval Morris, a guideline system that engineered "the proper balance between legislative, administrative, and judicial discretion in sentencing," could help to "at last bring principle, coherence, predictability, and justice to sentencing criminal offenders." Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 285 (1977); *see also*

---

[1] In the words of another early advocate of federal sentencing reform, sentencing guidelines were to provide a "way of introducing policy and purpose into what has largely been a normless sanctioning system." Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 368 (1989).

Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 94-96 (1999) (discussing reformers' vision of a "sound institutional structure for addressing lawlessness in sentencing").

The Sentencing Reform Act of 1984 effectuated these goals by setting forth central principles and factors for district judges to consider in 18 U.S.C. § 3553(a) and also by creating the U.S. Sentencing Commission to develop detailed sentencing guidelines. As this Court recognized in *Mistretta*, Congress in the SRA set the essential parameters for a guideline system and then tasked the Commission with developing more intricate sentencing rules. *See Mistretta*, 488 U.S. at 374-79. The text of 18 U.S.C. § 3553(a) requires district courts to "consider" the Guidelines and policy statements issued by the Sentencing Commission, but it also requires district courts to consider other case-specific and purpose-oriented considerations. As mentioned before, through the statutory structure of § 3553(a), Congress intended to "require that *the judge consider* what impact, if any, each particular purpose should have on the sentence *in each case*." S. REP. NO. 98-225, at 77 (1983) (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260.

Even after *Booker*, the Federal Sentencing Guidelines can, should, and inevitably will continue to play a major role in the federal sentencing process. No matter what this Court rules in these cases, probation officers will continue preparing presentence reports that still focus heavily on those sentencing factors—offense harms and criminal history—emphasized in the Guidelines. Moreover, examination and debate over Guideline issues can help ensure that district judges carefully examine the factual and legal issues raised in each case and should help ensure district judges never forget that every case is "a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime." *Koon*, 518 U.S. at 113. Guideline calculations often will provide a

useful starting point and framework for a sentencing judge and the parties to sort through the often complicated (and sometimes competing) facts and factors that arise in a particular case. Generally requiring basic Guideline calculations at the start of the sentencing process fosters a beneficial measure of procedural and substantive consistency: Guideline provisions can help frame, inform, and regularize the exercise of reasoned judgment by different sentencing judges across the nation.

2. Vices of unexplained (and perhaps unjustifiable) decisions by the Sentencing Commission

Though the Guidelines can and should aid the exercise of reasoned sentencing judgment, the Guidelines should not be elevated to an unjustified and unjustifiable sacrosanct status. After *Booker*, some lower courts appear to be clinging to the existing Guidelines like Linus clutching his security blanket. Disappointingly, circuit courts have not fully appreciated the importance of reasoned judgment at sentencing: they have insisted upon a Guideline-centric approach to post-*Booker* sentencing and continue to elevate some questionable Guideline diktats—such as whether DWI qualifies as a "violent felony" or whether loss was just less or more than $1,500,000—over reasoned and sound sentencing principles.[2]

---

[2] Given the emphasis on objective variables and the need to reduce all sentencing factors to simple, round numbers, the Guidelines make innumerable arbitrary distinctions and focus excessively on precisely-quantifiable inputs. *See* Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249, 251-52 (2005); Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics, in A More Perfect System: Twenty-Five Years of Guideline Sentencing Reform*, 58 STAN. L. REV. 277 (2005). Some degree of artificial line-drawing is perhaps a necessary part of the guidelines-drafting process. But this reality underscores the need for judges to engage in thoughtful and reasoned decision-making on a case-by-case basis, so as to avoid the

Rather than attend to the statutory language requiring simply that the Guidelines be considered, the federal circuits have decreed that district judges must always calculate precise Guideline sentencing ranges and must still provide a detailed case-distinguishing justification for any deviation from the Guidelines. Many circuits have declared within-Guideline sentences "presumptively reasonable" and then have applied this presumption almost conclusively; even circuits formally rejecting such a presumption have affirmed nearly every within-Guideline sentence and have signaled that the Guidelines provide the safest of safe sentencing harbors for district courts. *See generally* Brief of New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner, *Rita v. United States*, No. 06-5754 at Appendix (2006). Consequently, post-*Booker* circuit doctrines and practices encourage the sort of rote, mechanistic reliance on the Guidelines (with judicial fact-finding increasing sentencing ranges) that *Booker* found constitutionally problematic.

In addition to being constitutionally suspect, the circuit courts' presumption of reasonableness for within-Guideline sentences lacks a statutory foundation. Congress's nuanced sentencing instructions in § 3553(a) provide no textual basis for appellate courts to presume that all Guideline sentences are reasonable. In § 3553(a)'s detailed list of considerations, the Guidelines are just one factor among many—and not the first nor the most important one. The central command of § 3553(a) directs sentencing courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment. When developing and revising the Guidelines, the U.S. Sentencing Commission has never explored—nor even formally addressed—whether the Guidelines serve this parsimony mandate. In fact, the

---

unjust and arbitrary sentences that might otherwise result from a rigid application of inevitably crude categories.

Commission has stated that certain Guidelines—such as the disparately harsh crack sentence provisions, and the severe career-offender enhancement—undermine the sentencing goals set forth by Congress in § 3553(a)(2). A blanket presumption of reasonableness for all within-Guideline sentences ignores the Sentencing Commission's informed and express determination that some Guidelines do not produce just and effective sentences in many cases.

The principles expounded in *Booker* suggest that appellate courts should reverse their post-*Booker* approach of presuming within-Guideline sentences "reasonable" and requiring a justification for any variation. In light of *Booker*'s Sixth Amendment holding and the text of the SRA, circuit courts arguably should presume that within-Guideline sentences are suspect unless supported by an explanation of how the goals of § 3553(a) are served by following the Guidelines.

An appellate "presumption of unconstitutionality" for within-Guideline sentences would respect the merits opinion in *Booker* by ensuring that sentences are not the result of rote judicial fact-finding usurping the jury's role, and it would also force district judges to carefully evaluate all the § 3553(a) factors in each individual case rather than simply assume the Guidelines always achieve statutory goals. Even when a district court has decided that it should regularly follow the advice that appears in the Guidelines, it is still absolutely essential in each individual case "that the judge give reasons for his choice of sentence and that his sentences, and thus his reasons, be subject to appellate review." Morris, *supra*, at 274. As interpreted by this Court in *Booker*, both the Constitution and the Sentencing Reform Act demand this much.

II. A STATEMENT OF MODERN FEDERAL SENTENCING PRINCIPLES

Whatever this Court rules, these cases will, both formally and informally, represent a statement of modern federal sentencing principles. Consequently, we urge this Court to emphasize the importance of a sentencing process that requires judges, in compliance with the directives of § 3553(a), to consider relevant factors through a transparent process of reasoned sentencing judgment.

Significantly, in those courtrooms and cases in which district judges have thoughtfully attended to the provisions of § 3553(a) after *Booker*, the move away from a Guideline-centric sentencing process has generally furthered, not frustrated, the goals pursued by Congress when it enacted the Sentencing Reform Act. The most thoughtful post-*Booker* district court decisions demonstrate that an emphasis on § 3553(a) can make federal sentencing decision-making more principled, even-handed, transparent and proportional by (1) improving the balance between the application of structured sentencing rules and judicial discretion; (2) improving the balance between the impact of judicial and prosecutorial discretion at sentencing; (3) improving the opportunities for district judges to exercise reasoned sentencing judgment to tailor sentences to individual case circumstances; and (4) reordering outcomes so that defendants most deserving of reduced (or increased) sentences receive the benefits (or detriments) of expanded judicial authority to sentence outside the Guidelines. *See generally* Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUSTON L. REV. 341, 347-55 (2006).

The Court might be concerned that, with an emphasis on the commands of § 3553(a) and on individual judges exercising reasoned judgment, there is an increased risk of sentencing disparity. Indeed, it is possible that the reasoned judgment of a federal district judge in Wisconsin may differ from the reasoned judgment of a judge in Utah or New York

or Nebraska. But there is considerable evidence that the pre-*Booker* Guideline-centric sentencing process may have undermined, rather than enhanced, the goal of greater sentencing consistency in the federal system. *See* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005) (arguing Guidelines *increased* sentencing disparity in the federal system); *see also* U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004) (spotlighting Guidelines' inability to regulate prosecutorial discretion and noting increased impact of that presentencing discretion under the Guidelines).[3]

Perhaps more importantly, even though achieving greater sentencing consistency was one goal of the Sentencing Reform Act of 1984, it was not the only goal. The nuanced provisions of § 3553(a) is a stark reminder that Congress, in its statutory instructions to judges, listed "the need to avoid unwarranted sentence disparities" as only one of seven distinct sentencing considerations. *Cf.* Morris, *supra*, at 274 ("[E]quality in punishment is not an absolute principle; it is a value to be weighed and considered among other values."); Kate Stith & Jose A. Cabranes, *To Fear Judging No More: Recommendations for the Federal Sentencing Guidelines*, 11 FED. SENT'G REP. 187, 187 (1999) ("Uniform treatment ought to be *one* objective of sentencing, to be sure, but not the sole or overriding objective. A *just* sentence must also be a reasoned sentence and a proportional sentence, imposed through procedures that comport with our

---

[3] Moreover, an undue emphasis on uniformity in the federal system may exacerbate unwarranted disparities on the local level as between federal and state sentences for the same criminal conduct. *See* Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 730-35, 753-65 (2002).

basic understandings of due process of law in a constitutional system of checks and balances.").

Further, this Court's modern sentencing jurisprudence must be viewed as a dramatic and important statement that a range of values—such as our society's commitment to fair procedures, adversarial justice and the proper constitutional roles of juries and judges—needs to be balanced with and integrated into a modern quest for greater sentencing consistency. Absolute sentencing uniformity is not an achievable goal, nor should it be a goal doggedly pursued without recognizing that a just sentencing system should also strive to be thoughtful and reasoned, humane and respectful to all persons it impacts. Developing post-*Booker* doctrines that encourage judges to exercise reasoned judgment focused on the provisions of § 3553(a) is a step in the right direction as a matter of federal sentencing policy as well as a matter of constitutional jurisprudence.

CONCLUSION

For the foregoing reasons, the Court should resolve these cases in a manner that emphasizes the critical importance of judicial sentencing discretion and suggests the touchstone of federal sentencing should be district courts exercising reasoned judgment in response to case-specific factors and broader norms established by the Constitution and Congress.

Respectfully submitted,
EDWARD LEE
55 West 12th Avenue
Columbus, Ohio 43210
(614) 292-3201
Counsel of Record
for Amici Curiae

DECEMBER 18, 2006